No. 80-878

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ELLIS OLKON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota

MOTION OF THE MINNESOTA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, AND BRIEF AMICUS CURIAE

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Question Presented

That the fundamental due process right to a fair and impartial trial requires that where the Court conducts a hearing to determine whether extraneous prejudicial information was improperly brought to the jury's attention, that the Court question all implicated and available jurors and inquire into the facts about what was said, not simply into the juror's conclusions about whether prejudice was experienced, especially in circumstances where:

Evidence from several sources indicated that anti-Semitic remarks and other prejudicial comments were made by trial jurors. One of the jurors indicated that it was "an older man" who had made the anti-Semitic remarks. Another juror indicated that "an older man on the jury" had expressed his opinion that petitioner was guilty even before the commencement of the deliberations.

MOTION OF THE MINNESOTA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, AND BRIEF AMICUS CURIAE

The Minnesota Civil Liberties Union respectfully moves, pursuant to Rule 36 of this Court's Rules, for leave to file the within brief *amicus curiae*. Counsel for both the petitioner and the respondent have consented to the filing of this brief.

The Minnesota Civil Liberties Union is a private, non-profit, membership-only organization having approximately 3,000 members in the State of Minnesota. Its purpose is the protection of the rights and liberties preserved by the Minnesota and United States Constitutions. It is a

statewide affiliate of the American Civil Liberties Union.

The Minnesota Civil Liberties Union fully recognizes that the petitioner relies primarily on entrapment issues in its petition for a writ of certiorari and probably as a result of space limitations limits the juror misconduct issue to its statement of case (see p. 13, Petition for a Writ of Certiorari).

The Minnesota Civil Liberties Union believes that our constitutional system—which includes both the right to a fair trial and due process—is better served by a fair and full investigation of possible religious or racial discrimination by jurors (see dissents of Justices Yetka and Wahl, p. A-53, Petition for a Writ of Certiorari).

It is to present this analysis that *amicus* respectfully moves for leave to file this brief.

Respectfully submitted,

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Constitutional Provisions

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment XIV Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Interest of Amicus

The interest of *amicus* appears from the foregoing motion.

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-878

ELLIS OLKON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota

STATEMENT OF THE CASE

The case presents the unusual circumstances of an attorney being ensnared in an elaborate, police-contrived scheme incident to an investigation of a doctor and his business manager suspected of welfare fraud.

Subsequent to the conviction of Petitioner of attempted theft, Mr. Tom Matthews, an investigative reporter for KSTP-TV in Minneapolis, informed the trial court, by correspondence, that he was informed by two of the jurors that anti-Semitic remarks were made during the deliberations in Petitioner's case.

His letter is reproduced below.

KSTP TELEVISION

3415 University Avenue
Minneapolis 55414 St. Paul 55114
612/645-2724

November 8, 1979

The Honorable Douglas K. Amdahl
Hennepin County District Court
Room 1856
Hennepin County Government Center
Minneapolis, Minnesota 55487

Dear Judge Amdahl:

I was assigned to cover the Ellis Olkon trial for KSTP-TV. During the course of that assignment, some information came to my attention that I want to share with you.

Following the Olkon verdict, I wondered how the jury had fared in sorting out the various options available for their finding. In addition, I heard from at least two sources—I don't wish to identify them—that some anti-Semitic remarks may have occurred while the jurors were deliberating.

With that in mind, I proceeded to contact some of the jurors so I could get a feel for how they reached their verdict. This took place, of course, after your honor had dismissed the panel.

One of the Jurors, Mrs. Joan Gary, told me by telephone that she felt uncomfortable with the way the verdict was reached. When I asked her why, she indicated there was some unpleasantness in the jury room. I also asked her if she heard any anti-Semitic remarks. She indicated she had heard such a remark.

When we concluded our phone conversation, I

came away believing that Mrs. Gary had the opinion that one or more of the jurors had indicated a pre-conceived notion above Olkon's guilt even before considering the trial evidence. In fairness, I must point out that Mrs. Gary did not tell me her vote was influenced by any remarks she heard. At best, she regarded the reported anti-Semitic remarks as silly and crass. She did not know the juror's name and was able to identify him only as an older man.

Another juror, Mr. Gary Martinson, generally agreed with Mrs. Gary's recall of events in the jury room. I asked him about anti-Semitic remarks. His reply: "If there was a remark, as I remember, it was only a joke. There may have been one (a remark of that nature)."

Mr. Martinson also told me he believes that "an older man" on the jury—Martinson does not recall his name—expressed his feelings about Mr. Olkon's guilt at the immediate onsent of the deliberations. "He had him (Olkon) guilty before ever looking at it all (the evidence)," Mr. Martinson told me in a phone conversation. "The old guy—my opinion was he (the older man) wanted to get him (Olkon). He said the older man remarked to the jury that Olkon could have avoided his difficulty by "checking out his (Bower's) I.D., or by going to his apartment to learn whether he really lived there.". In addition, Mr. Martinson said he had heard from other jurors that the older man wished to find Olkon guilty from the "very beginning."

It is not my wish, your honor, to inject myself into this matter, since my assignment requires me to cover the remaining, related trial in this matter. But my high regard for your even-handed conduct of the Olkon trial persuades me that these matters must be brought to your attention.

I am aware that Mr. Olkon probably will be asking for a new trial. I am equally cognizant of the delicate nature of jury deliberations while arriving at verdicts. But I would be remiss in not making your honor aware of what I have learned; otherwise, your thoughtful instructions and admonitions to the jury about a fair trial would take on a hollow ring. On other matters, the courts and the media might disagree. On this—the right to an impartial trial based only on the evidence available—I am sure we are in accord.

Thank you for taking the time to read this. I shall be available at the numbers on the attached card should the court need clarification or have further questions.

Respectfully

TOM MATTHEWS
Investigative Reporter/
KSTP-TV

At about the same time, the father of one of the jurors, Mr. Richard Cox, voluntarily came forward with the information that his daughter, Joan Gary, had observed anti-Semitism during the jury deliberations. He made these remarks to Petitioner's attorney while in his law office on a legal matter unrelated to Petitioner's case. He signed an affidavit setting forth the facts which is reproduced below.

(Caption.)

AFFIDAVIT OF RICHARD COX

State of Minnesota
County of Ramsey—ss.

Richard Cox, being first duly sworn, deposes and says that he is a professional engineer and recently

brought to the attention of Theodore J. Collins, one of defendant Ellis Olkon's attorneys, the fact that he is the father of Joan Gary, one of the jurors who heard the above captioned case. That your affiant talked to his daughter about the matter on at least two occasions and was told that she was very disturbed by the proceedings.

Your affiant was told by his daughter that in her estimation the jury imposed a higher standard of care on the defendant Olkon that upon the normal defendant. In addition, your affiant was told by his daughter that there was anti-Semitism experienced by her during the time of the jury deliberations based upon statements of fellow jurors.

Further, your affiant was told by his daughter that the jurors did not deliberate with one another and that only she and one or two others actually reviewed the evidence and that she and the others who did review the evidence endured long periods of silence from the other jurors.

Further, your affiant was told by his daughter that she had the impression that the minds of many of the jurors were made up as soon as certain evidence had been heard by them, to-wit: the tapes. That your affiant's daughter was told, "you have heard the tapes, what other conclusion can there be."

Further, your affiant was told by his daughter that it was unlikely that any of the jurors involved in the matter would admit the true facts of what was apparent to his daughter as being expressions of disapproval of the ethnic background of the defendant and for that reason, she did not immediately make known to the court or anyone else the improprieties which she feels she observed.

Further, your affiant saith not.

RICHARD COX

Petitioner's attorney also learned that an attorney, James Hunter, had overheard a conversation between a juror and his employer which took place during the trial, and which suggested the possibility that the employer pressured the juror into voting for a guilty verdict. The employer, upon learning that the juror would not be finished with the case for at least "a couple of more days," stated, "hang the guy and get it over with," to which the other juror replied, "sure, George." (See Appendix, p. 1)

As a result of these indications of possible jury misconduct, Petitioner moved the trial court for a hearing pursuant to *Schwartz v. Minneapolis Suburban Bus*, 258 Minn. 325, 104 N.W.2d 301 (1960). The trial court granted a hearing but denied several of Petitioner's requests relating to the conduct of that hearing.

Petitioner requested that all jurors be questioned by the trial court. Since the Matthews letter said an "older" male juror had made an anti-Semitic remark, the trial court suggested that Mr. Peterson, one of the two older men, be called. Petitioner requested that Mr. Lund, the other older male juror, be called as well. The trial court selected six jurors to be questioned. The six included Joan Gary. However, the letter requesting that they appear and testify was sent to five jurors, not including Mrs. Gary, "through some inefficiency of the Court." (See Appendix, P. 4) Mrs. Gary was questioned three days after the other five jurors appeared in court and after their remarks were quoted extensively in the local media. Mrs. Gary's statements to the court were substantially modified from her earlier remarks to her father that included the information that she had not come forward

with her feelings about the jury misconduct earlier because she had concluded that no one would believe her. In addition to Mrs. Gary, one of the older men, and the two jurors referenced in the Hunter affidavit and the Matthews letter, the trial court called the jury foreperson and one other juror selected at "random."

Petitioner additionally requested that the scope of the court's inquiry be expanded to include the question of whether any jurors mentioned Petitioner's religious or ethnic background. The court denied this request and limited the questioning to each juror's conclusions of whether anti-Semitism had been expressed.

It is not in dispute that the jurors had been extensively questioned on voir dire with regard to their impartiality and freedom from prejudice of any kind.

The trial court found no evidence of jury misconduct after a brief hearing.

ARGUMENT

I.

THIS CASE PRESENTS SERIOUS QUESTIONS OF FEDERAL AND STATE LAW WHICH HAVE NOT BEEN SETTLED BY THIS COURT: THE CONSTITUTIONAL IMPLICATIONS OF PROPER INQUIRY AT A JURY MISCONDUCT HEARING, WHERE RELIGIOUS OR RACIAL DISCRIMINATION MAY HAVE AFFECTED THE DELIBERATIONS IN A CRIMINAL CASE.

The trial court properly granted a jury misconduct hearing in the instant case as required by both Minnesota and federal case law. *Schwartz v. Minneapolis Suburban*

Bus, supra; *Turner v. Louisiana*, 379 U.S. 466 (1965); *Parker v. Gladden*, 385 U.S. 363 (1966).

The *amicus* maintains that the trial court erred in making an arbitrary decision to call six jurors and not all twelve for questioning at the jury misconduct hearing and especially to have neglected to have called both of the older male jurors. At the hearing on the motion requesting the hearing, the trial court referred to Mr. Peterson as the oldest juror and as an appropriate juror to be called, but then inexplicably failed to call him for the hearing. Rule 26.03, subd. 19(6) of the Minnesota Rules of Criminal Procedure uses the term "jurors", and clearly indicates that a sufficient number of jurors should be called so that the defendant will be afforded a full, complete and fair inquiry into any possible misconduct. As stated above, such inquiry is compelled in view of the serious and immediate consequences to be suffered by a defendant as a result of an adverse verdict in a criminal trial. The *amicus* maintains that the trial court erred in making this arbitrary decision in view of the lack of a definitive description of the individual juror mentioned in the Matthews letter. In view of the seriousness of the matter to be investigated by the trial court and the lack of any definitive identification of the jurors actually involved in such misconduct, a full and comprehensive inquiry into the matter could only be accomplished by the calling of either all twelve jurors for questioning by the trial court regarding possible misconduct, or at least all jurors that are available. The failure to call, at a minimum, one of the jurors most strongly implicated in possible misconduct was a clear abuse of discretion. Indeed, in view of the serious-

ness of the result, it is a small inconvenience and expenditure of time to require that all jurors be examined.

Dissenting Justices Yetka and Wahl support this view, as stated in their opinion:

". . . there was evidence submitted to the trial judge that anti-Semitic remarks were made during jury deliberations. . ."

". . . I would think that we ought to interpret the rule to provide that where religious or racial discrimination may have affected the deliberations, all jurors that are available ought to be questioned, particularly in a criminal case." (See Petition for a Writ of Certiorari, p. A-53.)

The trial court and the majority opinion below rely on Rule 606 (b) of the Minnesota Rules of Evidence (same as the Federal Rule). The rule states, in part, as follows:

". . . except that a juror may testify on the question *whether extraneous prejudicial information was improperly brought to the jury's attention* or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." (Emphasis supplied.) (See pp. A-42 and A-43 of Petition for a Writ of Certiorari.)

Reliance on an interpretation of this rule to allow arbitrary selection of the jurors to be questioned or to allow limitation of the scope of inquiry to juror's conclusions rather than facts, is irreconcilable with prior decisions of this and other courts. In *Tobias v. Smith*, 466

F. Supp. 1287 (1979), as here, prior to trial prospective jurors were subjected to extensive voir dire by Petitioner's attorney. The case involved a black defendant in a criminal case where identification of the defendant was the most essential issue before the jury. The issue of jury misconduct was raised by the affidavit of a juror who quoted the jury foreman as saying that it was unimportant that the witnesses could not identify a photo of defendant because "You can't tell one black from another. They all look alike." (Id. at 1289). Another juror asserted that the jurors should take the word of two white victims, as opposed to a black defendant.

The Court in *Tobias* considered the conflicting public policy considerations involved in the issue of impeaching jury verdicts. Additionally the Court considered the question whether the alleged comments merited further inquiry to determine if they may be evidence of the kind of extraneous influence improperly brought to the jury's attention as contemplated by the Rule. The Court concluded in the affirmative, that ". . . the statements in the juror's affidavit are sufficient to raise a question as to whether the jury's verdict was discolored by improper influences and they are not merely matters of jury deliberations." (Id. at 1290). The Court in *Tobias* also notes that:

> "In addition to consideration of Rule 606(b), the sixth amendment guarantee of a fair trial to a criminal defendant injects a constitutional element into the evidentiary question. See, e.g., *Parker v. Gladden*, 385 U.S. 363 (1966). As noted by the New York Court of Appeals, when the Supreme Court has held 'that a particular series of events, when proven, vio-

> lates a defendant's constitutional rights, implicit in that determination is the right of the defendant to prove facts substantiating his claim.' See *People v. DeLucia*, 20 N.Y.2d 275, 278, 282 N.Y.S.2d 526, 528, 229 N.E.2d, 211, 213 (1967). Whatever the scope of a jurisdiction's non-impeachment rule, a court determination of whether particular jury events are open or closed to inquiry must consider a defendant's sixth amendment rights to confront witnesses, to the assistance of counsel, and to an impartial jury. See *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Parker*, supra, at 364, 87 S.Ct. 468, 17 L.Ed.2d 420; *People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933).

The petitioner in this case was denied an adequate opportunity to prove the facts substantiating his claim because, although the court granted a hearing to inquire into jury misconduct, the scope of that inquiry was so severly limited as to make the full disclosure of facts essential impossible.

In *State v. Levitt*, 36 N.J. 266, 176 A2d 465 (1961), the mere mention of defendant's religion and the religion of some of his character witnesses, by the jury during deliberations, was determined by the court to be grounds for setting aside the verdict. In that case the defendant, as here, was Jewish. The trial court in *Levitt* granted a new trial on juror affidavits alone, on the grounds that ". . . somebody for some reason injected the question of this man's religion, and apparently the religion of many of his character witnesses, into the deliberations of the jury." (See Anno., Disclosure in criminal case of juror's political, racial, religious, or national origin prejudice

against accused or witnesses as ground for new trial or reversal, 91 A.L.R.2d 1112.)

The *amicus* therefore maintains that the allegations in the Matthews letter and Cox affidavit regarding the predisposition of an older juror were sufficient grounds to widen the scope of the inquiry by the Court to all of the jurors and beyond interrogation regarding jurors' conclusions of anti-Semitic bias to include if actual information as to whether any mention was made of Petitioner's religion.

Counsel for Petitioner best concluded his request for a juror misconduct finding by stating on December 18, 1979 the following: ". . . It is not reasonable to think that two jurors could independently come to the conclusion that there was an injection of anti-Semitism without there being some cause. That is as difficult as to think that the footprint on the sands of the shore is not made by a human foot . . . I don't see how the Court can ignore the fact that a common series of events generally has an author."

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

(Caption)

AFFIDAVIT OF JAMES HUNTER

State of Minnesota
County of Hennepin—ss.

James Hunter, being first duly sworn, deposes and says that he is an attorney licensed to practice law in the State of Minnesota.

That while he was working with a client at Chester's Restaurant on a Thursday afternoon in September, 1979, he had occasion to overhear a conversation involving a person whom he later learned was a juror in the above captioned trial.

That while he was seated in the restaurant a person then unknown to him but whom he later learned to be named Gregory B. Rien, came by and was addressed by your affiant's client. That your affiant's client said to Mr. Rein, "where have you been—it's about time that you got here", or its equivalent. That further, a client stated, "are you almost finished", to which Mr. Rein replied, "it looks like a couple of more days." The final words of the conversation were by the client, "hang the guy and get it over with", to which the juror made the reply, "sure, George."

That later your affiant learned that the discussion had taken place between a juror, to-wit: Rien, and his employer and involved the Ellis Olkon trial and that your affiant makes this Affidavit at the request of the attorney

for the defendant, Ellis Olkon. That the discussion took place about 2:00 p.m. on a Thursday in September, the exact date of which your affiant is at present unaware. That your affiant has set down the conversation to the best of his present recollection.

Further, your affiant saith not.

JAMES HUNTER

(Caption)

ORDER

The above-entitled matter came regularly on for hearing before the undersigned on December 18, 1979 on motion of defendant for an order "granting a new trial and/or judgment of acquittal" as set forth in defendant's motion filed herein on October 5, 1979, his memorandum in support of said motion filed December 12, 1979 and his letter under date of December 11, 1979 and filed December 13, 1979 expanding on the memorandum.

Theodore J. Collins, Esq., appeared for and on behalf of defendant, and Daniel F. Byrne, Esq., Assistant Hennepin County Attorney, appeared for and on behalf of plaintiff.

Upon all the files, records and proceedings herein, and upon the arguments of counsel and the memoranda submitted, IT IS ORDERED:

That defendant's motion be, and hereby is, denied in all things.

That the sentencing of the defendant herein be, and hereby is, set for January 9, 1980 at 9.00 o'clock a.m.

in Courtroom 1856, Courts Tower, Government Center, Minneapolis, Minnesota.

Dated: December 27, 1979.

By the Court:

DOUGLAS K. AMDAHL
Judge of District Court

Let the attached Memorandum be made a part hereof.

JUROR MISCONDUCT

Defendant has alleged misconduct of the jury as a ground for his present motion. The Court has set forth in a Memorandum supporting its Order granting a "Schwartz" hearing the basis for defendant's allegations.

The Court requested six of the twelve jurors to appear for questioning concerning alleged statements indicating religious bias. Two of the six were jurors named in documents filed with the Court (a letter from Mr. Matthews—a TV investigator—and an affidavit of the father of one of the jurors) reciting alleged anti-Semitic conduct. A third juror was one who was named in an affidavit filed concerning a lunch-time contact with his employer, and, because his presence was needed to question him on that event, was also to be one of the jurors to be questioned about the anti-Semitic allegation. A fourth was one of the oldest jurors who was selected by the Court because Mr. Matthews' letter referred to "an older man" as a source of a statement indicating bias. The fifth juror was the foreperson of the jury, and the sixth was chosen at ran-

dom from the remaining jurors to bring to 50% the jury representation at the hearing.

The defendant now—and at the hearing—complains that all of the jurors should have been questioned as to religious bias. The Court is of the opinion that since none of the questioned jurors heard any anti-Semitic statements (five said there were no such statements and one said he didn't hear any if there were any), there has been a sufficient inquiry made and that inquiry established that there was no improper juror or jury conduct.

The Court received the letter of Mr. Matthews on November 9, 1979. The Court immediately made copies of that letter and sent a copy to each of defense and prosecution counsel on the same date. Witthin a week defendant filed and served his motion for a "Schwartz" hearing and in support thereof submitted two affidavits alleging juror misconduct and referred to Mr. Matthews' letter. The motion was heard November 26, 1979 and on November 27th the Court issued its Order, together with its Memorandum granting the motion.

The "Schwartz" hearing was scheduled for December 10th and the six jurors were requested to appear for questioning. Five of the six, appeared and were questioned. The sixth juror did not appear because, through some inefficiency of the Court, she had not received a note of the date and time for the hearing. The latter juror did appear December 13th and was then questioned.

The Court had limited the questions by counsel to the six jurors to matters alleged in the affidavits and Mr. Matthews' letter, and for those matters further limited the area of questioning to Rule 606(b) R.Evid. parameters to ". . . whether extraneous prejudicial information was im-

properly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . ."

Defendant's counsel requested on December 10th that he be permitted to go beyond the rule in his questioning, and the Court denied the request.